

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

CPV STATEN ISLAND, INC. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 2012 through May 31, 2017. :

In the Matter of the Petition :

of :

VINCENZO PARRELLI :

for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Periods December 1, 2012 through February 28, 2015, :
June 1, 2015 through May 31, 2017, and September 1, :
2013 through May 31, 2017. :

In the Matter of the Petition :

of :

GIULIA SALUMERIA CORP. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period September 1, 2013 through May 31, 2017. :

DETERMINATION
DTA NOS. 829725,
829729, 829730 AND
829773

In the Matter of the Petition :
of :
VINCENZO PARRELLI :
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Periods September 1, 2013 through May 31, 2017. :

Petitioner, CPV Staten Island, Inc., filed a petition for revision of a determination or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2012 through May 31, 2017.

Petitioner, Giulia Salumeria Corp., filed a petition for revision of a determination or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2013 through May 31, 2017.

Petitioner, Vincenzo Parrelli, filed petitions for revision of determinations or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the periods December 1, 2012 through February 28, 2015, June 1, 2015 through May 31, 2017, and September 1, 2013 through May 31, 2017.

A consolidated hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on March 23, 2022, with all briefs due by December 14, 2022, which date began the six-month period for issuance of this determination. Petitioners appeared by Gabor and Marotta LLC (Richard M. Gabor, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

ISSUES

I. Whether petitioners have sustained their burden of proving that the use of an external index to estimate tax was improper and/or erroneous and the resulting tax was improper.

II. Whether petitioners have sustained their burden of proving that penalties should be abated.

FINDINGS OF FACT

1. Petitioner, CPV Staten Island, Inc. (CPV), is an Italian delicatessen/pork store located in Rosebank, Staten Island, New York and does business as Montalbano's of Rosebank.

2. Petitioner, Giulia Salumeria Corp. (Giulia), is an Italian delicatessen/pork store located in Rossville, Staten Island, New York and does business as Montalbano's of Rossville.

3. Petitioner, Vincenzo Parrelli, is the owner and president of both CPV and Giulia.¹

4. CPV was registered as a vendor for sales tax purposes and filed New York sales tax returns for the period in issue. In contrast, Giulia was not a registered vendor for sales tax purposes and had not filed New York sales tax returns for the period in issue.

5. By letter dated July 10, 2017, the Division of Taxation (Division) advised CPV that a sales tax field audit of its books and records for the period December 1, 2012 through May 31, 2017, would commence on July 28, 2013. Also, by letter dated July 10, 2017, the Division advised Giulia that a sales tax field audit of its books and records for the period September 1, 2013 through May 31, 2017, would commence on July 28, 2013. The respective audit appointment letters advised CPV and Giulia that all of their respective books and records pertaining to its sales and use tax liability for the audit period specified should be available for review on the audit appointment date. Attached to both audit appointment letters were an

¹ Petitioner Vincenzo Parrelli's status as a responsible person of CPV and Giulia is not at issue in this proceeding.

Information Document Requests (IDR) that specified a detailed listing of records that were to be available for the entire audit period, including sales tax returns; worksheets and cancelled checks; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; all exemption documents supporting nontaxable sales; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules; lease contracts; utility bills; guest checks; cash register tapes, and capital asset list.

6. During the audits, Richard Gabor represented both CPV and Giulia.

7. At the first meeting with CPV's representative, the Division's auditor only received Department of State incorporation information for CPV. The representative identified three of CPV's suppliers, but did not provide purchase invoices. Following the issuance of this first IDR, the Division issued two additional IDRs during the course of its audit of CPV. In response to the three IDRs, CPV only provided some bank statements, federal forms 1120 for the years 2013 through 2016 and copies of CPV's sales tax returns. No sales records were provided.

8. With respect to the audit of Giulia, Mr. Gabor provided one copy of a federal form 1120S and some bank statements. No sales records were provided to the auditor. Later in the audit, the representative provided Department of State incorporation information for Giulia and, subsequently, a listing of checks from the New York City Board of Education for catering performed by Giulia.

9. The Division was able to obtain CPV and Giulia's respective leases through the issuance of subpoenas directed to the entities' respective landlords.

10. On November 2, 2017, the auditor did a survey of Giulia. The log entry states in pertinent part as follows:

“the Auditor visited the place of business during the lunch time. And the place [sic] very busy and it is too small. They selling [sic] a lot of sandwiches, specially [sic] for police officers, They sell taxable items such as soda, sandwiches, beers, clearing [sic] and drinks.”

11. On January 19, 2018, the auditor also did a survey of CPV. The log entry states in pertinent part as follows:

“the Auditor visited the place of business during the lunch time. And the place [sic] very busy and it is [sic] good medium size store. They selling [sic] a lot of sandwiches, Hot Sandwiches, Soups, Fresh Salads, Gourmet Wraps, Panini Sandwiches and also they do Catering such as Pasta, Seafood, Vegetables, Carving Board and Endress and much more. Also they sell taxable items such as soda, Drinks and battle [sic] of water and clearing [sic] items.”

12. Included within the audit file is a combined menu for Montalbano’s of Rosebank (CPV) and Rossville (Giulia) (collectively Montalbano’s). Montalbano’s specifically references itself as “King of the Hero’s” [sic] on its menu. The menu consists of eight pages and lists ten different hot sandwiches, ten different cold sandwiches, sixteen different gourmet wraps, sixteen different panini sandwiches, thirteen different salads in small and large sizes, five soups in small and large sizes as well as a soup of the day. Two of the menu pages are dedicated to catering and list numerous pasta dishes, seafood dishes, vegetable dishes, carving boards (i.e., roast beef, ham, turkey, roasted pork loin, prime rib, and combinations thereof); cold cut platters, fresh mozzarella platters, cheese platters, fruit platters, sandwich, submarine and wrap platters, various hors d’oeuvres and desserts. The menu refers to both locations and describes itself as a pork store and an Italian food specialties store.

13. The Giulia audit file also included printouts from CPV and Giulia's website indicating that they offer a variety of daily lunch specials in addition to the regular menu. One of the webpages states as follows:

“Montalbano's is a Full Service Supplier of top quality meats, imported Italian products and the finest cheeses. We are not just a deli, we stock gourmet foods that are prepared daily! Along with our Fresh Mozzarella made daily.”

14. Lacking complete books and records to perform detailed audits, the auditor estimated both entities' gross taxable sales by using an indirect audit methodology.

15. To compute estimated gross sales for Giulia, the auditor consulted the National Restaurant Association's Restaurant Industry Operations Report (RIOR) for 2013-2014. The auditor obtained the median quartile occupancy costs of 6.5% for limited-service restaurants with a menu theme of sandwiches/subs/deli. The rental expense, as obtained from the lease agreement, was divided by the 6.5% occupancy cost to arrive at gross sales for the audit period. The auditor factored into this amount an estimate of 20% for nontaxable sales; i.e., sales of raw meat, cold cuts, frozen foods, cookies, juices, etc., to arrive at taxable sales. In addition, the auditor also factored in the amount of nontaxable catering sales Giulia made to the New York City Board of Education in arriving at taxable sales.

16. To compute audited gross sales for CPV, the auditor also consulted the RIOR for 2013-2014. The auditor obtained the median quartile occupancy costs of 6.5% for limited-service restaurants with a menu theme of sandwiches/subs/deli. The rental expense as obtained from the lease agreement was divided by the 6.5% occupancy cost to arrive at gross sales for the audit period. The auditor factored into this amount an estimate of 20% attributable to nontaxable sales; i.e., sales of raw meat, cold cuts, frozen foods, cookies, juices, etc., in arriving at taxable sales.

17. A copy of the first page of the RIOR and the page from the RIOR for limited-service restaurants with a menu theme of sandwiches/subs/deli and the page where the auditor obtained the occupancy cost factor was included in the audit files of CPV and Giulia. In addition, the Division introduced a complete copy of the RIOR into the hearing record in this matter.

18. On July 9, 2018, the Division issued a statement of proposed audit changes to CPV asserting tax of \$284,138.65 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi). On August 17, 2018, the Division issued another statement of proposed audit changes to CPV to correct an error contained in the July 9, 2018 statement of proposed audit changes. The revised amount of tax asserted due in this statement of proposed audit changes was \$222,486.97.²

19. On August 2, 2018, the Division issued a statement of proposed audit changes to Giulia asserting tax of \$167,497.33 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

20. On August 27, 2018, the Division issued notice of determination, notice number L-048716510, to Giulia for the period September 1, 2013 through May 31, 2017, which asserted sales tax due of \$167,497.33 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

21. On August 29, 2018, the Division issued notice of determination, notice number L-048721109, to CPV for the period December 1, 2012 through May 31, 2017, which asserted sales tax due of \$222,486.97 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

² A note in the audit workpapers indicates that the auditor did not subtract the amount of taxable sales reported by CPV in its filed sales tax returns for the period in issue, but that an adjustment would be made at a later date to account for the previously reported taxable sales.

22. On August 30, 2018, the Division issued notice of determination, notice number L-048723655, for the period September 1, 2013 through May 31, 2017, to petitioner Vincenzo Parrelli, as responsible person of Giulia, which asserted sales tax due of \$167,497.33 plus interest, and penalties pursuant to Tax Law § 1145 (a) (1) (i) and (vi).

23. On August 31, 2018, the Division issued notices of determination, notice numbers L-048725811 and L-048725810, to petitioner Vincenzo Parrelli, as responsible person of CPV for the periods December 1, 2012 through February 28, 2015, and June 1, 2015 through May 31, 2017.

24. At the hearing in this matter, petitioners presented the testimony of Pasquale Parrelli, the brother of petitioner Vincenzo Parrelli. Mr. Parrelli works for both CPV and for Giulia and is familiar with the operations of both stores. Pasquale Parrelli testified that both businesses are pork stores and that sandwiches and prepared foods were only offered to reduce spoilage and that they represented a small portion of the CPV's and Giulia's total sales. Mr. Parrelli testified that he views the two stores as butcher shops and stated that sandwiches and catering made up a very small percentage of CPV's and Giulia's business. In conjunction with Mr. Parrelli's testimony, copies of 27 photographs were introduced into the record. These photographs depict CPV's and Giulia's stores and show a variety of grocery items including cheeses, fresh meat, breadcrumbs, pastas, breads, olive oil, refrigerated coolers, a portion of a deli counter, and other miscellaneous grocery items. Although Mr. Parrelli claimed that the two stores are mirror images of one another, the auditor's log describes CPV as a medium-sized store while describing Giulia as small.

25. The Division did not present the testimony of the auditor who performed the audits of CPV and Giulia because, at the time of the hearing, he was retired. In his place, the Division

presented the testimony of Tina Wong, another sales tax auditor whose testimony was based upon her review of the audit files of CPV and Giulia. During the hearing, Ms. Wong was questioned by petitioners' representative about the appearance of NAICS codes in various places in the audit file and whether, after reviewing the evidence submitted by petitioners, she would have used a rent occupancy factor for a convenience store or a grocery store. Ms. Wong was reluctant to answer the questions, explaining that without observing the establishments herself, she could not state the rent factor chosen was incorrect. She further explained that she would have liked to have seen sales records in order to determine whether the establishments were limited-service restaurants or whether they were specialty food stores.

CONCLUSIONS OF LAW

A. The Tax Law imposes sales tax on every retail sale, except for resale, of tangible personal property (*see* Tax Law § 1105 [a]) and of certain enumerated services (*see* Tax Law § 1105 [c]). A “retail sale” is “a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101 [b] [4] [i]). Tax Law § 1135 (a) (1) provides that “[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require.”

B. Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed was incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. . . .” (Tax Law § 1138 [a] [1]). When acting pursuant to section 1138 (a) (1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to

demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

C. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.*, as follows:

“To determine the adequacy of a taxpayer’s records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352 (3 Dept 1984)]) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer’s books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is ‘virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit’ (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), ‘from which the exact amount of tax due can be determined’ (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, ‘[c]onsiderable latitude is given an auditor’s method of estimating sales under such circumstances as exist in [each] case’ (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).”

D. In these matters, the Division made proper requests for both CPV's and Giulia's books and records, and both entities failed to produce the same. The records were not only inadequate to perform a detailed audit, they were nonexistent. In fact, the Division was forced to subpoena the entities' respective leases. Thus, the Division was entirely justified to resort to a rent factor. Petitioners do not dispute these facts. Here the controversy centers around whether it was unreasonable for the Division to choose a rent factor from a limited-service restaurant from the RIOR.

E. It is petitioners' burden to prove, by clear and convincing evidence, that the audit method utilized by the Division was unreasonable or that the resulting assessment was erroneous. "To meet the clear and convincing evidence standard of proof, a party must adduce evidence that makes it highly probable that what he or she claims is what actually happened" (*Krol v Eckman*, 256 AD2d 945, 947 [3d Dept 1998], citing *Prince, Richardson on Evidence* § 3-205, at 104 [Farrell 11th ed]).

F. I find that for both entities, petitioners have failed to prove both that the audit methodology was unreasonable and failed to prove that the tax asserted erroneous. Petitioners argue that the use of a restaurant classification in determining which rent index to apply was irrational when the businesses at issue are specialty grocery stores. Here, if it was unreasonable to use a rent factor for a limited-service restaurant, the only evidence presented by petitioners was the testimony of Pasquale Parrelli, the brother of petitioner Vincenzo Parrelli, coupled with photographs of the two stores. Pasquale Parrelli testified that both businesses are pork stores and that sandwiches and prepared foods were only offered to reduce spoilage and that they represented a small portion of the CPV's and Giulia's total sales. Petitioners' attempt to downplay the significance of Montalbano's menu as a stock menu that all pork stores use is

rejected. Petitioners provided no documentation to support this testimony and more importantly, failed to present any sales records such as sales invoices, register tapes, etc. In fact, the Division used a rent factor for a limited-service restaurant because it made a visit to both establishments and observed a brisk lunch business. As pointed out by the Division in its brief, both establishments have a “robust” menu and offer daily lunch specials as well as offer catering. I find that Mr. Parrelli’s testimony that prepared items such as sandwiches and hot items to be insignificant to be incredible given that both stores are marketed as delis and the combined menu for both refers to the stores as “King of the Hero’s.” Petitioners cannot meet their respective burden of proof by disavowing the Division’s finding each is a limited-service restaurant with a deli theme without clear and convincing proof that the rent factor chosen is erroneous (*see Matter of Henry St. Superior Deli Corp.*, Tax Appeals Tribunal, February 21, 2017). While petitioner offered pictures of both stores that show they both offer nontaxable food items such as raw meat, pasta, olive oil, etc., what is absent are sales records that would prove they functioned more as a grocery rather than a delicatessen. Their menus, as taken from their website, certainly support the original auditor’s finding that both establishments operated as limited-service restaurants. Having produced little in the way of records during audit, petitioners cannot now be heard to complain about any resulting inexactness of the audit (*Matter of Meyer v State Tax Commn.*, 61 AD2d 223, 228 [3d Dept 1978], *lv denied* 44 NY2d 645 [1978]). With respect to the notice of determination issued to CPV, notice number L-048721109, the Division is directed to modify same to account for tax remitted on taxable sales reported on CPV’s sales tax returns (*see* footnote 2), and to make the corresponding modification to the two notices of determination, notice numbers L-048725811 and L-048725810, issued to petitioner Vincenzo Parrelli, as responsible person of CPV.

G. The Division asserted penalty herein pursuant to Tax Law § 1145 (a) (1) (i) and (vi). Tax Law § 1145 (a) (1) (i) states that any person failing to file a return or pay over any sales or use tax “shall” be subject to a penalty. This penalty may be canceled if the failure was “due to reasonable cause and not due to willful neglect” (Tax Law § 1145 [a] [1] [iii]). Tax Law § 1145 (a) (1) (vi) states that any person who omits from the total amount of tax required to be shown on a sales tax return an amount which is in excess of 25 percent of such total amount “shall be subject to a penalty equal to ten percent of the amount of such omission.” Like the penalties imposed under Tax Law § 1145 (a) (1) (i), penalties imposed under section 1145 (a) (1) (vi) must be sustained unless the failure was due to reasonable cause and not due to willful neglect. Petitioners have not provided any evidence or arguments sufficient to constitute reasonable cause to support abatement or cancellation of penalties. Neither entity provided much, if any, records during the respective audits and Giulia never filed sales tax returns in the first instance. Therefore, penalties are sustained.

H. The petitions of CPV Staten Island, Inc., and Vincenzo Parrelli, are granted in accordance with conclusion of law F, but otherwise are denied, and the notices of determination dated August 29, 2018 and August 31, 2018, as modified, are sustained.

I. The petitions of Giulia Salumeria Corp., and Vincenzo Parrelli are denied and the notices of determination, dated August 27, 2018 and August 30, 2018, are sustained.

DATED: Albany, New York
June 08, 2023

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE